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Zoller, James Frank

Taxation of machinery and fixtures

[Atlanta, Ga.]

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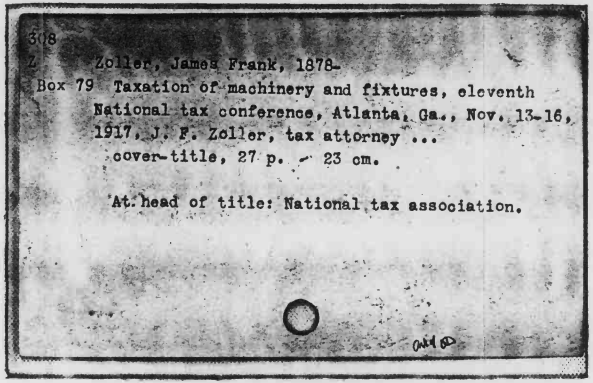
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NATIONAL TAX ASSOCIATION

TAXATION OF MACHINERY AND FIXTURES

ELEVENTH NATIONAL TAX CONFERENCE
ATLANTA, GA., NOV. 13-16, 1917

J. F. ZOLLER, Tax Attorney
Schenectady, N. Y.

Taxation of Machinery and Fixtures

If, on the one hand, tangible personal property should be taxed in the same manner as real estate, then the different laws making machinery personalty or realty are of no practical importance from a taxation standpoint. If, on the other hand, tangible personal property should be classified and taxed in a different manner than real estate, it becomes important to know under the law in the different jurisdictions what machinery is classified as real estate and what machinery is classified as personal property, in order to ascertain what changes in the law should be made to bring about equitable and practicable taxation of machinery.

This paper is prepared upon the assumption that it is inequitable and impracticable to attempt to tax tangible personal property at the rates which now generally prevail against real estate in the different states. As authority for this assumption I quote from an address delivered at the Tenth Annual Conference of this Association by Professor Charles J. Bullock of Harvard University as follows:

> "Tangible personal property continues in all the states, except Minnesota, to be taxed like real estate. Yet it would seem that in a proper scheme of classification this kind of property should be segregated and taxed at a special rate. It consists, for the most part, of merchandise, machinery, and live stock, property which may be assumed to be employed in trade and to yield an ordinary trade profit which may be taken to be about ten per cent. From property of this description, which is mobile and subject to severe interstate and even international competition, it is doubtful if any of our States ever has collected, or can expect to collect, taxes that absorb more than ten per cent of the income. Since $100 of such property may be assumed to yield an average income of about $10, the proper tax rate would be 80 cents or $1.00 per $100; but the rates prevailing in our States are usually double these figures. The result is general undervaluation, by which tangible personalty as a class is assessed at from 30 to 60 per cent of its true value, while in individual cases assessments range from nothing up to 100 per cent, producing the grossest inequalities between taxpayers. The introduction of better methods of taxing intangible property has indeed simplified and improved somewhat the taxation of tangible personalty, the efforts of efficient State tax commissions have changed things for the better, but the problem has not been solved.
>
> "For manufacturing and commercial States the question is one of the greatest importance. In these commonwealths public expenditures are usually heavy and tax rates are high. Strict en-

forcement of a tax amounting to $1.50 to $2.50 per $100 would not be long tolerated by public opinion, since it would drive so much business to other states. The rational, expedient, and straightforward thing to do is to reduce the tax to a figure that can be collected, and then enforce the law in all cases without fear or favor. When expenditures are small and the general tax rate does not equal or exceed $1.00 per $100 the matter may not be of importance; but elsewhere the proper classification of tangible personal property is becoming increasingly desirable and necessary."

Economically machinery is tangible personal property. From a legal standpoint machinery is personal property or real estate according to the law (common or statutory) of the jurisdiction in which the machinery is taxable.

Any state has the power to make personal property real estate or real estate personal property, for taxation purposes. (Johnson v. Roberts, 102 Ill. 655; Shelbyville Water Co. v. People, 140 Ill. 545; Smith v. New York, 68 N. Y. 552; People v. Board of Assessors, 39 N. Y. 81)

Accordingly in New York many articles of tangible personal property are taxable as real estate because of the definition of the terms "land" and "real estate" in the tax law. In Illinois machinery including power generating apparatus is taxable as personal property because of a statutory provision regardless of the true character of such property. Kentucky has recently passed a statute classifying both agricultural and manufacturing machinery without regard to its character as realty or personalty and taxing it at a rate lower than that prevailing against real estate in general. A majority of the states, however, do not attempt to define machinery as either personalty or realty nor to classify it for the purpose of taxing it at a rate less than that prevailing against real estate. Such states simply provide in a general way for the taxation of real estate and personal property leaving it for the courts to decide under the common law what machinery is personalty and what machinery is realty. In the states where the common law rule prevails it is necessary to know what that rule is, because in many cases debts are deductable from personal property value in ascertaining the taxable value, while they are not deductable from real estate value. In Wisconsin and also in New York so far as manufacturing corporations are concerned, income taxes are payable in lieu of taxes upon personal property but in addition to taxes upon real estate. So it is becoming exceedingly important in many instances to determine the character of machinery as personalty or realty under the common law rule, in order to ascertain its status for the purpose of taxation in certain states.

The common law rule as to what machinery is personalty or realty is covered by what is known as the "Law of Fixtures." If anyone should attempt to ascertain what fixtures are personalty and what real estate by merely examining the multitudinous number of decisions rendered upon the subject, the result would be utter and endless confusion and the in-

evitable conclusion that such decisions were irreconcilable and made with no regard for the doctrine of "Stare decisis." In the case of Noyes v. Terry, 1 Lansing (N. Y.) 219, the court made the following statement:

> "The law of 'fixtures' is confessedly the most uncertain title in the entire body of our jurisprudence; and a judge might in any given case, decide either way without much danger of having his judgment impeached, or of failing to find some authority to support it. It follows that almost every case that is presented, must be tested and determined by the special facts which it exhibits."

If, however, the subject is approached with a knowledge of the history of the law in its development in this country together with a knowledge of the fundamental principles involved, so that each case may be read with these things in mind the leading cases of the different jurisdictions are not irreconcilable and the rule in one common law jurisdiction in this country does not differ fundamentally from that in another jurisdiction.

In the first place it should be borne in mind that the original common law rule of England which "subjected everything affixed to the freehold to the law governing the freehold," probably never prevailed in this country. It has been stated repeatedly by our courts that "the English common law is not to be taken in all respects to be that of America. Our Ancestors brought with them its general principles and claimed it as their birthright, but they brought with them and adopted only that portion which was applicable to their situation." (Dubois v. Kelly, 10 Barb. (N. Y.) 496-501.)

In this country the law of fixtures has "grown up into a system of judicial legislation, so as almost to render the right of removal of fixtures a general rule, instead of being an exception" (Dubois v. Kelly, Supra.) or in other words, it would appear to be the rule when the fixture is to be deemed personalty and the exception when it is to be deemed realty.

The common law rule of fixtures is the same between the following parties:

(a) Vendor and Vendee
(b) Grantor and Grantee
(c) Mortgagor and Mortgagee
(d) Heir and personal representative of deceased

Buckley v. Buckley, 11 Barb. (N. Y.) 63
Snedeker v. Warring, 12 N. Y. 170
Walder v. English, 137 A. D. (N. Y.) 43
McFadden v. Allen, 134 N. Y. 490
Murdock v. Gifford, 18 N. Y. 31
Preston v. Briggs, 16 Vt. 128
Williams Firth Co. v. South Carolina Loan and Trust Co., 122 Fed. 569

The leading American cases appear to have reached the conclusion that there is no one test that will determine that a fixture has become a

part of the freehold but such determination depends upon the united application of the following elements:

(1) Actual annexation to the realty, or something appurtenant thereto.
(2) Appropriation to the use or purpose of that part of the realty with which it is connected.
(3) The intention of the party making the annexation to make the article a permanent accession to the freehold.

Teaff v. Hewitt, 1 Ohio St. 511
Bemis v. First Nat. Bank, 63 Ark. 625
Hacker v. Munroe, 176 Ill. 384
Binkley v. Forkner, 117 Ind. 176
Thompson v. Smith, 111 Iowa 718
Dodge City Water Co., v. Alfalfa Land Co., 64 Kan. 247
Brownell v. Fuller, 64 Nebr. 558
Brearley v. Cox, 24 N. J. L. 287
Ward v. Kilpatrick, 85 N. Y. 413
McRea v. Troy Cent. Nat. Bank, 66 N. Y. 489
Fitzgerald v. Atlanta Home Ins. Co., 61 A. D. (N. Y.) 350

ANNEXATION.

With the exception of certain well recognized instances, there must be actual annexation to the freehold in order for any fixture to become a part of the realty.

Jermyn v. Hunter, 93 A. D. (N. Y.) 175
Potter v. Cromwell, 40 N. Y. 287
McRea v. Central Nat. Bank of Troy, 66 N. Y. 489
Walker v. Sherman, 20 Wend. (N. Y.) 636
Goddard v. Chase 7 Mass. 432
Farrar v. Chauffetete, 5 Denio (N. Y.) 527
Cosgrove v. Troescher 62 A. D. (N. Y.) 123
Beardsley & Kirkland v. Ontario Bank, 31 Barb. (N. Y.) 619

The doctrine of Constructive fixtures or property not annexed to the freehold though used in connection with it was early repudiated and actual annexation required to convert personal property into realty. Upon this question Judge Kirkland in an early case (See Walker v. Sherman, 20 Wend. (N. Y.) 636, 652) said:

> "The Reasoning of Mr. Dane, and of the learned Judge in Farrar v. Stackpole (6 Green 154), before cited, * * * * * * does not appear to be sustained by authority, when it seeks to raise a general doctrine of constructive fixtures from the moral

> adaptation of what is in fact a mere movable, to the carrying on a farm or factory, etc., however essential the movable may be for such purpose. The argument in that shape proves too much. Such adaptation and necessity might be extended even to the use of domestic animals on a farm, and certainly to many implements in a manufactory which could never be recognized as fixtures, without utterly confounding the rule by which the rights of the heir or the purchaser have been long governed."

It has accordingly been held that the weight or size of a machine is no criterion in determining whether or not the machine is to be considered as a part of the realty. Machines kept in their places by their weight alone have been held as a general proposition to constitute personal property and not real estate.

Roddy v. Brick, 42 N. J. Eq., 218, 225
Re Trevy, 14 L. R. (N. S.) 193
Rogers v. Brokaw, 25 N. J. Eq., 496
Holbrook v. Chamberlain, 116 Mass., 155
Cole v. Roach, 37 Tex. 413
Taffe v. Warnick, 3 Blackf., (N. Y.) 111
Tobias v. Francis, 3 Vt. 425
Taylor v. Townsend, 8 Mass., 416
Wells v. Maples, 15 Hun (N. Y.) 90

In the case of Wells v. Maples, supra, it was held that a shingle machine and planer though used as a part of a saw mill were personal property as a matter of law because they were not annexed to the realty. In the opinion of that case the court said:

> "The planer is not fastened to anything, but is held in place by its own weight. It is connected with the machinery by a belt, that can be slipped off; and that is all the connection. It can be taken up and set on one side, and this had been done several times.
>
> "The shingle machine stands on a box, the size of the machine, made of four-inch plank, about sixteen inches high. It is not framed to the floor, nor fastened to the floor except that on one side there is a strip so that it cannot slip. A portion of a post in the building was cut to make room for the machine, and the machine is wedged into this place.
>
> "The shingle machine was placed in the mill for permanent uses, for custom work, as one of the original owners says. We do not understand by this testimony that the witness states that they intended 'to make a permanent accession to the freehold'. (Potter v. Cromwell, 40 N. Y. 297) The fastening of the shingle machine was to prevent it from moving.
>
> "We think that the learned justice was correct in holding under these circumstances, that the planer and shingle-machine were personal property."

Connection with the motive power by belting is not sufficient to make a machine a part of the realty.

United States v. Friction-Match Mach. 1 Haskell (U. S.) 32
Shepard v. Blossom, 66 Minn. 421
Atlantic Trust Co., v. Atlantic City Laundry, 64 N. J. Eq., 140
Scheifele v. Schmitz, 42 N. J. Eq., 700
Kendall v. Hathway, 67 Vt., 122
Haggert v. Brampton 28 Can., 174
Patterson v. Johnson, 10 Gr. Ch. (Ont.) 583
Gooderham v. Denhouse, 18 Up. Can. Q. B. 203
Sun Assurance Co., v. Taylor, 9 Man. 89
Taylor v. Townsend, 8 Mass., 416
Smith v. Whitney, 147 Mass. 479
Farrar v. Chauffetete, 5 Denio (N. Y.) 527

The Rule requiring actual annexation in order to constitute personal property a fixture and part of the realty together with the recognized exceptions to the general rule is concisely stated by Justice Allen in the case of Beardsley v. Ontario Bank, 31 Barb. (N. Y.) 619, 629 in the following language:

> "Fixtures are personal chattels annexed to land, which may be severed or removed by the party entitled to them, against the will of the owner of the freehold. 'The term fixtures is one denoting the reverse of its name.' The general rule is that all things which are attached to the freehold or annexed to the land, become a part of it, if the annexation be made firmly and with an intention that it shall be permanent. Exceptions have been engrafted upon the rule, for the benefit of trade and manufacture, from time to time, and these have been most usually in favor of tenants as against their landlords. Annexation in some form is necessary to constitute that a part of the land which is ordinarily personal property. The annexation in some cases is by gravitation alone, but then the thing so annexed is, in most cases, either a part of some machine, the principal part of which is actually annexed to some building, fastened or let into the soil, or is necessary to complete a building, or to the occupation of the land for the purposes of the trade to which it is adapted and has been appropriated. With a few special exceptions, such as locks, keys, bars, movable shutters, blinds, etc. which are all necessary to complete the building to which they are fitted; charters, deeds, etc., and the box or chest in which they are contained; fish in a fish pond; rabbits, etc., in a warren; deer in a park, etc., which all go with the inheritance as heir looms, and which are considered as annexed and necessary to the enjoyment of an inheritance; chattels in order to lose their characteristics as personal property, must at least be so far fixtures that they are permanent in one place. The very idea of a fixture is of a thing fixed or attached to something as a permanent appendage, and implies firmness in position. But that which becomes by annexation a part of the soil is something more than a fixture, and requires at

least as much permanence as to constitute a fixture. The maxim, *Quecquid plantatur solo, solo credit,* which tersely expresses the principle, makes the affixing of the chattel to the soil the test by which it is declared to belong to the soil. Hence, courts, in determining the questions that have arisen, have looked at the mode and intention of annexation, the object and customary use of the thing annexed, and in determining the intention, the character of the claimant has had its weight. But fitness and adaptation and intention to annex, without actual or constructive annexation, does not make a chattel a part of the realty. A man may have the rafters, doors and windows made to fit precisely his house and the positions they are respectively to occupy, and brought to the ground; but until actually put and affixed in and to the house, and thus made a part of it and the land upon which it stands, they remain personal property. When once attached, they may be removed for temporary purposes without destroying their character as a part of the realty. It would be a vain work for me to undertake that which more able judges have avowed an inability to do, to wit, to review all the cases in which the question has arisen under greatly differing circumstances, and in almost every variety of form, and reconcile the apparent conflict of decisions, and deduce from all a certain rule, easy of application, and to which every case may be made to conform.

It is suggested that the articles claimed under the mortgage passed as incident to and accessory to the principal thing granted, and as a part of the means to obtain it and all the fruits and effect of it. It is well settled that where any thing is granted, all the means to enjoy it and the incidents and accessories pass with it. As by a grant of ground, a grant of way to it; by a grant of trees, the power to cut them; by a grant of mills, the waters, flood gates, and the like, that are of necessary use to the mill. (1 Shep. Touch. 89, 90. House v. House, 10 Paige, 158. Babcock v. The Western Rail Road Co., 9 Met. 553.) But divers things, that, by continued enjoyment with other things, are only appendant to others, as warrens, leets, waifs, estrays, and the like, will not pass by the grant of those other things. (1 Shep. Touch. 89. Archer v. Brumul, 1 Lev. 131.) If the thing claimed is a means of enjoyment of the thing granted, as a right of way or other easement over the other lands of the grantor, the only question is whether the right claimed is necessary. If it is claimed as a part of the thing granted, because necessary to the usual and profitable employment of the thing granted, and adapted to its use, the question is whether it is affixed and made a substantial part of the freehold, or is a mere annexation for the purpose of trade or manufacture, as in the latter case, it would not be included in the grant. (Murdock v. Gifford, 18 N. Y. Rep. 28) Actual physical annexation is not claimed here as to most of the property in controversy, but a constructive annexation resulting from the fitness and necessity of the articles, to the right use of the main thing. The examples given of constructive annexation, which alone will supply the want of actual annexation, are the stone of a mill taken out to pick it; keys, locks, doors, etc., sails of a wind mill, windows, etc. (Grady's Law of Fixtures, 15.) These examples take the place of a definition, in terms, of a constructive annexation, and the chattels which become realty by constructive annexation must belong to the same class or come within the reasons which control in such cases.

"They must be such as go to complete the building or machinery which is affixed to the land, and which, if removed, would leave the principal thing incomplete and unfit for use." In order to pass as an accessory of that which is confessedly realty, it would be accessory to it, and not to a matter of a personal nature. A fire engine was considered as an accessory to the carrying on of the trade of getting and vending coals from the land, a matter of a personal nature, and therefore is not a part of the realty. (Lawton v. Lawton, 3 Atk. 13. Lord Derby v. Lord Ward, 1 Amb. 13.) The carrying of passengers and freight is a matter of a personal nature, to which, and not to the rail road as realty, the 'locomotives, cars, etc., are accessory.' C. J. Shaw, in Winslow v. Merchants' Ins. Company, (4 Met. 314,) after speaking of the difficulty of laying a general rule, says, 'In general terms, we think it may be said that where a building is erected, as a mill, and the water works of steam works, which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, though not at the time of the conveyance, attachment or mortgage, attached to the mill, are yet parts of it, and pass with it by a conveyance, mortgage or attachment.' In the same case it was decided that all articles of stock, such as iron and coal, and all materials to be wrought, and the hand tools and all implements not driven by the steam engine, and articles not annexed to the building nor embedded in the ground, nor constituting parts of such mill, were to be deemed personalty, and not realty. This is, I think, the extent of the rule of constructive annexation. Broom, in his Legal Maxims, page 190, says, 'It is not sufficient that the article in question merely rests upon the soil, or upon such foundation; unless there be annexation, no difficulty can under any circumstances occur.' Lord Mansfield held that salt pans, put in salt works by the ancestor, went to the heir as part of the inheritance, and not to the executor. He put the decision upon the ground that the owner erected them for the benefit of the inheritance, and could never have intended to give them to the executor. These salt pans were fixed with mortar to a brick floor, and there were furnaces under them. (Lawton v. Salmon, 1 H. Black. 259 in notes.) This has been called a mixed case of an erection, for the benefit of trade, as well as of the inheritance, and effect was sought to be given to the intent of the owner. The cases of Farrar v. Stackpole, (6 Greenl. 157,) Voorhees v. Freeman, (2 W. & S. 116), and Pyle v. Pennock, (Id. 300,) so far as they dispense with annexation of chattels to the soil or building, as an essential requisite to change the character of a personal chattel, and make such change to depend upon the fitness and adaptation of the article to the purposes for which the real estate is used, are opposed by the decision of our own courts. Perhaps they may be reconciled to our decisions, but not upon any principle which could affect this case. The American editor of Smith's Leading Cases, is of the opinion that the doctrine of the Pennsylvania court must prevail, if at all, by its own authority, since in all the cases in which chattels have been elsewhere treated as fixtures, there has been some annexation, although in some instances slight in its character, to the premises on which they were placed. (2 Smith's Lead. Cases, Law Lib. ed. 169, top paging.) The cases of water wheels, mill stones, running gear and bolting apparatus of a grist and flouring mill, which in House v. House, (supra,) were held to be constituent parts of the mill, is not an exception

to the rule of requiring some annexation. The frame work and foundation upon which the water wheel rests, and upon which it turns upon its axle, is necessarily a part of a building, or embedded in the soil, and that and the wheel are made for each other, and both are parts of the completed building and essential to it, and all the gearing connected with it form a part of the same machinery. It all has a permanent and fixed position. It is stationary, not movable, in one place to-day and another to-morrow;"

If the article when attached becomes a part of the realty its temporary removal has been held not to be sufficient to change its character from realty to personalty (See Beardsley v. Ontario Bank, supra) for the article although temporarily detached is said to still have a constructive annexation. In New York this doctrine has been extended so as to apply to hop poles removed from realty with the intention of again affixing them to the freehold the following season. Bishop v. Bishop, 11 N. Y. 123; Sullivan v. Toole 26 Hun (N. Y.) 203.

In the absence of evidence establishing the intent of the annexor to make them a permanent accession to the freehold, articles of machinery used in a manufactory only attached to the building to keep them steady and in their places, so that their use as chattels may be more beneficial, and removable without material injury to the freehold or to the articles themselves, retain their character as personal property notwithstanding such annexation.

Swift v. Thompson, 9 Conn. 63
Gaylor v. Harding, 37 Conn. 508
McKim v. Mason, 3 Md. Ch. Dec. 186
Graves v. Pierce, 53 Mo. 423
Tobias v. Francis, 3 Vt. 425
Sturges v. Warren, 11 Vt., 433
Vanderpool v. Van Allen, 10 Barb. (N. Y.) 157
Cresson v. Stout, 17 John. (N. Y.) 116
Murdock v. Gifford, 18 N. Y. 28.
Farrar v. Chauffetete, 5 Denio (N. Y.) 527
Cosgrove v. Troescher, 62 A. D. (N. Y.) 123
N. Y. Life Ins. Co. v. Allison, 107 Fed. 179
Walker v. Sherman, 20 Wend. (N. Y.) 636

In the case of Farrar v. Chauffetete, supra, the court said:—

"All the circumstances make a different case from that of a mill erected for the purpose of placing machinery in it with a driving wheel, making a part of the building and a dam to raise a head of water for motive power; so different that I can suppose they would vary the principle of the rule as between vendor and vendee, and that it might happen that what would be properly held fixtures in the one case, might under the same circumstances

of attachment, be held personal property in the other. As an illustration, a threshing machine attached to the timbers of a barn by bolts and nuts or cleats, and moved by a horse power, and capable of being taken away without injury to the building, I think would not pass by a deed of the farm on which the barn stood. If, however, the machine was attached in precisely the same manner, but operated by a water-wheel, fixed to the building, and moved by hydraulic power, conducted for the purpose of the building, the machine might pass by a deed of the farm. So if a tobacconist should place in a store already erected, a steam engine and machinery, the former on timbers embedded in the ground, and the latter fastened to the building by bolts and cleats, I think the engine and machinery would hardly pass by a deed of the freehold. But if the building were originally erected for the purpose of placing in it the engine and machinery, and afterwards the building enlarged for the purpose of storing the manufactured article, the whole would probably pass by a deed of the soil."

In the case of Cosgrove v. Troescher, supra, the Court made the following statement:—

"It is quite likely that the refrigerators and gas logs were also movables as matter of law, but the evidence is not sufficiently definite or satifactory to enable us to declare. It does not appear whether the alcoves in which the refrigerators were placed were finished off to correspond with the rest of the room, or whether the refrigerators were purchased in the market or specially constructed to fit these alcoves. It does not appear that the trimmings and furnishings of the refrigerators corresponded with the rooms in which they were located. The evidence does not show whether the awnings had been specially constructed for the windows of these apartments or whether they had been used. The same is true of the drying frames."

Some confusion has resulted in an attempt to reconcile the class of cases last cited with other cases holding the articles attached to be real estate although the annexation would appear in some of such cases to be equally slight. The distinction between these two classes of cases probably lies in the fact that in the former class of cases the intent to make the attached article a permanent accession to the freehold was not established while in the latter class of cases there was evidence establishing such intent. Where such intent clearly exists it has been held that slight affixing to the realty will make the articles affixed a part of the realty. This distinction is well illustrated in the case of Farrar v. Chauffetete, 5 Denio (N. Y.) 527, 530-33 in which the court said:

"As an illustration, a threshing machine attached to the timbers of a barn by bolts and nuts or cleats, and moved by a horse power, and capable of being taken away without injury to the building, I think would not pass by a deed of the farm on which the barn stood. If, however, the machine was attached in precisely the same manner, but operated by a water-wheel, fixed to the building, and moved by hydraulic power, conducted for the

purpose to the building, the machine might pass by a deed of the farm. So if a tobacconist should place in a store already erected, a steam engine and machinery, the former on timbers embedded in the ground, and the latter fastened to the building by bolts and cleats, I think the engine and machinery would hardly pass by a deed of the freehold. But if the building were originally erected for the purpose of placing in it the engine and machinery, and afterwards the building enlarged for the purpose of storing the manufactured article, the whole would probably pass by a deed of the soil. These illustrations are used to show that each case must in some degree depend upon its own circumstances; that the principles applicable as between vendor and purchaser, must vary with the varying circumstances of each case. The question of intention enters into and makes an element of each case. The circumstances are to be taken into account to show whether the erections were made for the permanent improvement of the freehold, or for the temporary purposes of trade."

APPROPRIATION TO USE OF REALTY.

If the article is actually annexed to the realty and there is evidence establishing intention to make it a permanent accession to the freehold appropriation to the use or purpose of that part of the realty with which it is connected is usually inferred or presumed. But in case there is annexation only, the question of special appropriation becomes important as bearing upon the intent of the annexor in making the annexation.

Oliver v. Lasing, 59 Nebr. 219
Penn. Mut. L. Ins. Co. v. Semple, 38 N. J. Eq. 575
Blancke v. Rogers, 26 N. J. Eq. 563
Fitzgerald v. Atlanta Home Ins. Co., 61 A. D. (N. Y.) 350
New York Ins. Co. v. Allison, 107 Fed. 179
Bender v. King, 111 Fed. 60
Murray v. Bender, 125 Fed. 705
Hudson Trust Etc. v. Carr-Curran Paper Mills Co., 58 N. J. Eq. 59
Temple Co. v. Penn. Mut. Life Ins. Co., 69 N. J. L. 36
Fish Co. v. Young, 127 Wis. 149
Crane Iron Works v. Wilkes, 64 N. J. L. 193
Newfelder v. Third St. & S. Ry. 23 Wash. 470

The cases last cited establish the proposition that where the thing attached is equally suitable for use in connection with real estate generally, appropriation to the use or purpose of the particular real estate to which it happens to be attached is not established. Thus machinery attached to a particular mill or factory but suitable for use in any other similar mill or factory has been held personal property, the lack of special adaptability being evidence that the annexor did not intend to make such machinery a permanent annexation to the freehold. New York Ins. Co. v. Allison, 107

Fed. 179; Hudson Trust & Savings Inst. v. Carr-Curran Paper Mills Co., 58 N. J. Eq. 59; Crane Iron Works v. Wilkes, 64 N. J. L. 193; Newfelder v. Third St. & S. Ry. 23 Wash. 470.

In the case of New York Ins. Co. v. Allison, supra, the court said:—

"Unless the annexation is of a machine or chattel especially adapted for use in the particular place where it has been put, the purpose of the annexation and the intention with which it has been made are the most important considerations, and are the determining criterion." See also quotation from Cosgrove v. Troescher on page 10 hereof.

In the case of Voorhees v. McGinnis, 48 N. Y. 278, 286, we find the following statement:—

> "It is further found that the planing machine, fire pump, saw benches and saws were worked by bands and other modes of transmitting motion from the engine, through the gearing and shafting above mentioned, and were complete in themselves as machines, as were also the copper pipes for steaming hubs, and were of equal use and value wherever they were wanted, and were affixed to the building only for convenience in using, and were capable of removal without injury to the building or to themselves.
>
> "There is greater doubt whether these articles come within the rule which would make them fixtures. They are less permanent in their character; the actual annexation is much slighter, and their use evinces less evidence of an intended accession to the freehold. They may well be held to be chattels and to pass under the chattel mortgages."

In the case of Berliner v. Piqua Club Ass'n., 32 Misc. (N. Y.) 470, 472, Justice Russell said:

> "The courts have advanced in the last half century from the inspection as to how firmly articles have been attached to the realty, in the ascertainment as to whether they pass with it by conveyances, to the *more important consideration of union in usefulness for the structure and permanence of association.*"

It has been stated that the application of this test (appropriation or adaptibility), of the character and use of the article is most frequently called for in connection with machinery or apparatus in a building, and the cases suggest the idea that when a building is erected for, or permanently devoted to, a particular purpose, anything annexed to the building for the carrying out of that purpose may be considered as accessory to the realty itself, while articles annexed merely for the purpose for which the building happens at the time to be used are not to be so regarded. (See 13 Am. and Eng. Enc. of Law (2nd Ed.) 613.)

In the case of Roddy v. Brick, 42 N. J. Eq. 225, Justice Bird said:

> "It would seem that when a building is erected for a particular purpose, and machinery is placed therein to effectuate that purpose, and is reasonably necessary therefor, and is in some substantial manner attached to the land or the building, and consequently to the freehold, so as to give one the idea of permanency and to evince an intention of making a fixture of it, the courts incline to regard such machinery as part of the realty, irrespective of weight or size, unless the size be such that the machine cannot be removed without removing or damaging the building."

In the case of Fortman v. Goepper, 14 Ohio St. 558, the court used this language:

> "The general principle to be kept in view, underlying all questions of this kind, is the distinction between the business which is carried on in or upon the premises, and the premises, or *locus in quo*. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain the personal character of the principal to which they appropriately belong and are subservient. But articles which have been annexed to the premises as accessory to it, and not peculiarly for the benefit of a present business, which may be of temporary duration, become subservient to the realty and acquire and retain its legal character."

In Rogers v. Brohan, 25 N. J. Eq. 496, the vice-chancellor said:

> "Movable machines, like these, whose number and permanency are contingent on the varying circumstances of the business, subject to its fluctuating conditions, and liable to be taken in or out as exigencies may require, are different in nature and legal character from the steam engine, boilers, shafting, and other articles secured by masonry or other substantial annexation, designed to be permanent, and indispensable to the enjoyment of the freehold."

It would seem that in order to make machinery attached to a building a part of the realty because of appropriation or adaptability the building must have been erected for a special purpose and the machinery placed therein to effectuate that special purpose or, to put the matter another way the machinery in order to become realty must be reasonably necessary or accessory to the use of the building whatever business may be carried on therein. On the other hand machinery which can be used in one place as well as another, and which adds nothing to the building itself, though it may be of advantage to the business (Chase v. Tacoma Box Co., 11 Wash., 377) and which as to "permanency is contingent on the varying circumstances of the business, subject to its fluctuating conditions, and liable to be taken in or out as exigencies may require" does not constitute realty because of appropriation or adaptability.

In a large manufacturing establishment consisting of several buildings, the number and permanency of such machines as were usable in one building as well as in another, would certainly depend upon "the varying circumstances of the business, subject to its fluctuating conditions, and liable to be taken in or out as exigencies may require." Such machines in such establishments would certainly be classified as personal property under the rule laid down in the foregoing cases so far as appropriation or adaptability was concerned.

It has accordingly been held in the case of a building erected for the sole purpose of a twine factory and equipped with special machinery attached thereto to be used exclusively for the manufacture of twine, that the machinery so attached and so used constituted real estate. (See McRea v. Central National Bank of Troy, 66 N. Y. 489.) (See also National Starch Company v. Waldron, 26 A. D. (N. Y.) 527.)

INTENTION OF ANNEXOR TO MAKE ARTICLE PERMANENT ACCESSION TO FREEHOLD

This question of intent upon the part of the annexor is said to be a mixed question of law and fact, the fact being determined by the jury upon proper instructions by the court. Scobell v. Block, 31 N. Y. S. 975; Hopewell Mills v. Taunton Savings Bank, 23 N. E. (Mass.) 327.

In the case of Cosgrove v. Troescher 62 A. D. (N. Y.) 121, 126 the court said:

> "The determination of the question may depend upon the intention of the owner, to be ascertained not from his testimony as to what he intended nor from any undisclosed purpose or intent which he may have had, but from his acts and conduct, and all the surrounding facts and circumstances."

In the case of McRea v. Troy Cent. National Bank of Troy, 66 N. Y. 489, 496 the court said:

> "The mode of annexation may, it is true in the absence of other proof of intent, be controlling. It may be in itself so inseparable and permanent as to render the article necessarily a part of the realty, and in case of less thorough annexation the mode of attachment may afford convincing evidence that the intention was that the attachment should be permanent; as for instance where the building is constructed expressly to receive the machine or other articles, and it could not be removed without material injury to the building or where the article would be of no value except for use in that particular building, or could not be removed therefrom without being destroyed or greatly damaged. These are tests which have been frequently applied in determining whether the annexation was intended to be temporary or permanent, but they are not the only ones, nor is it indispensable that any of these conditions should exist."

It has been generally held that intention does not mean the undisclosed purpose, but the purpose as manifested by acts and the sound inferences therefrom. Snedeker v. Warring, 12 N. Y. 170; Hopewell Mills v. Taunton Savings Bank, 150 Mass. 519.

In the case of Jermyn v. Hunter, 93 A. D. (N. Y) 175, 177, it was stated:

> "In the absence of any expression of intention * * * it follows as a legal conclusion from the character of the property, the place provided for its installation and the necessity of the use of the same in connection with the occupation of the building, that the appurtenance was intended to and became a permanent part of the realty as much as the windows, doors and mantels."

In the case of Teaff v. Hewitt, 1 Ohio St. 512, it was held that:

> "The machinery and implements in a manufacturing establishment, although useful and even essential to the business carried on, which are not permanently affixed to the ground or the structure of the building, and which can easily be removed without material injury to the building or articles themselves, and their place supplied by other articles of a similar kind, are not fixtures, but personal property. But that portion of the machinery in such an establishment which is firmly fixed to the earth or the structure of the building and which from its nature, mode of attachment, use and the relative situation of the party placing it there, was plainly intended to be permanent, is parcel of the freehold."

It was held in that case that the carding machinery of a woolen factory, attached to the building by cleats to confine them to their proper place, and subject to removal whenever convenience or business required, were not fixtures but chattels; while the steam-engine and boiler, used to supply the motive power, permanently fixed upon a foundation laid in the earth, were regarded as realty.

This case has been cited as authority in recent Ohio cases. (See Case Manufacturing Co. v. Garver, 13 N. E. 493), and undoubtedly represents the law in Ohio today. The principle cited in this case seems to distinguish between the power and generating apparatus in a factory and the machinery propelled or operated by such apparatus, the former being considered realty and the latter personalty. It would seem that when the owner of a building intended for manufacturing purposes places therein power generating apparatus that his reasonable intent might be presumed to be to make such generating apparatus a permanent accession to the freehold because whatever manufacturing might be subsequently carried on the power generating apparatus would be required in order that the real estate might be subservient to the use for which it was intended. The principle upon which the Ohio doctrine is established is well

stated in the case of Case Manufacturing Company v. Garver, Supra, in the following manner:

> "The machinery furnishing the motive power is generally more closely annexed to the freehold, and of a more permanent nature, as the power furnished by it may be adapted to the propulsion of the machinery of a variety of mills without any substantial change in the motive power itself, or in the building, other than by substituting one kind of machinery for another; while the machinery that is propelled has more of the general character of personalty, is not as a rule so closely annexed to the freehold, and may be removed, and frequently is, from one mill to another, as any other article of personalty. Hence it has generally been held in this country that articles of machinery used in a factory for manufacturing purposes only attached to the building to keep them steady in their places, so that they may be more serviceable when in use, and that may be removed without any essential injury to the freehold or the articles themselves, are personal property, and do not pass by a conveyance or mortgage of the freehold. Ewell, Fixt. 294. On the other hand, steam-engines and boilers, with their appliances, that supply the motive power of machinery, and, for purpose of use, are usually stably attached to the realty, pass by a conveyance or mortgage of the land. 1 Schouler, Per. Prop. 155; Ewell, Fixt, 290; I Washb. Real Prop. 8."

In the case of Hopewell Mills v. Taunton Savings Bank, 23 N. E. (Mass.) 327, it was held that machinery for the manufacturing of cotton cloth placed in a cotton mill erected for the special purpose of manufacturing cotton became a part of the realty upon the ground that as both building and machinery were connected for a special purpose the intent of the annexor must have been to make such machinery a permanent accession to the freehold. In the opinion Judge Knowlton said:

> "Except in cases where a contract determines the question, a machine placed in a building is found to be real estate or personal property from the external indications which show whether or not it belongs to the building as an article designed to become a part of it, and to be used with it to promote the object for which it was erected, or to which it has been adapted and devoted, an article intended not to be taken out or used elsewhere, unless by reason of some unexpected change in the use of the building itself. The tendency of the modern cases is to make this a question of what was the intention with which the machine was put in place. Bank v. Machine Works, 127 Mass. 545; Turner v. Wentworth, 119 Mass. 459; Allen v. Mooney 130 Mass. 155; Paper Co. v. Servin, Id. 513; Hubbell v. Bank, 132 Mass., 447; Maguire v. Park, 140 Mass. 21, 1 N. E. Rep. 750; McRea v. Bank, 66 N. Y. 490; Hill v. Bank, 97 U. S. 450; Mill Co. v. Hawley, 44 Iowa, 57. These cases seem to recognize the true principle on which the decisions should rest, only it should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles, not merely his own rights, but the rights of others, who have or who may acquire interests in the property. They cannot know his secret purpose; and their rights depend, not upon that, but upon the inferences to be drawn from what is external

> and visible. In cases of this kind, every fact and circumstance should be considered which tends to show what intention, in reference to the relation of the machine to the real estate, is properly imputable to him who put it in position. Whether such an article belongs to the real estate is primarily and usually a question of mixed law and fact. Allen v. Mooney, 130 Mass. 155; Turner v. Wentworth, 119 Mass. 459; Maguire v. Park, 140 Mass. 21, 1 N. E. Rep. 750; Carpenter v. Walker, 140 Mass. 416, 5 N. E. Rep. 160; Bank v. Mason, 147 Mass. 500, 18 N. E. Rep. 406. But the principal facts, when stated, are often such as will permit no other presumption than one of law. It is obvious that in most cases there is no single criterion by which we can decide the question. The nature of the article, and the object, the effect and the mode of its annexation, are all to be considered. In this commonwealth it has been said that 'whatever is placed in a building subject to a mortgage by a mortgagor or those claiming under him, to carry out the purpose for which it was erected, and permanently to increase its value for occupation or use, although it may be removed without injury to itself or the building, becomes part of the realty.' Pierce v. George, 108 Mass. 78; Bank v. Mason, ubi supra. This rule generally prevails in other jurisdictions. Parson v. Copeland, 38 Me. 537; Holland v. Hodgson, L. R. 7 C. P. 328; Longbottom v. Berry, L. R. 5 Q. B. 123; McRea v. Bank, 66 N. Y. 490; Hill v. Bank. 97 U. S. 450; Harlan v. Harlan, 15 Pa. St. 507; Railroad Co. v. Iron Co., 36 N. J. Eq. 452; Roddy v. Brick, 42 N. J. Eq. 225, 6 Atl. Rep. 806; Mill Co. v. Hawley, 44 Iowa, 57. We are of opinion that it is applicable to the case at bar. The building mortgaged was a cotton-mill; and the machinery in controversy was all procured for use in manufacturing cotton cloth. Most of it was heavy; and there is much to indicate that, while there were changes in the kinds of goods manufactured, the machines were not of a kind intended to be moved from place to place, but to be put in position, and there used with the building, until they should be worn out, or until, for some unforeseen cause, the real estate should be changed, and put to a different use. Of most of them, it is said in the agreed statement that they were fastened to the floor for the purpose of steadying them when in use; but it is also said that this is not a statement of the only purpose for which they were fastened. They seem to have been attached to the building, and connected with the motive power, with a view to permanence."

It has been stated that the intention of the annexor is inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of the annexation and the purpose or use for which the annexation has been made.

Teaff v. Hewitt, 1 Ohio St. 511
Hopewell Mills v. Taunton Savings Bank, 150 Mass. 519
Jermyn v. Hunter, 93 A. D. (N. Y.) 175

It has been held in New York that a portable gristmill moved into a building formerly used as a tannery connected with the motor power and machinery therein, fastened in a secure and a permanent manner to the

building for the purpose of permanently using it as a custom gristmill becomes a part of the realty as between vendor and vendee. This mill was fastened to the building by placing two sticks of timber parallel with each other upon the floor as far apart from each other as the width of the mill frame and extending from one side of the room to the other. Then the mill in its frame was set upon these cross timbers and iron rods or bolts provided with screws, nuts and washers were run down through the frame timbers, the cross sticks, the floor joists and other corresponding cross sticks under the floor joists supported by upright posts resting on the cellar bottom or set in the ground. The referee found as a fact that when the mill was put in by the judgment debtor he designed it as a permanent structure for use as a custom and gristmill for that neighborhood. Potter v. Cromwell, 40 N. Y. 287.

This case has been sometimes cited in New York as authority for holding that machinery so attached became a part of the realty. It is probable, however, that if the referee has not found that the annexor intended to make the mill a permanent accession to the freehold the case would have been otherwise decided. For example, if it had appeared in this case that the mill was used in this building and also in other buildings it probably would not have been held to have been real estate.

On the other hand, it has been held in New York that looms in a woolen factory placed on the floors in the factory and fastened to the floor by means of screws in each loom for the purpose of keeping the looms in their places and steady during the operation did not become real estate but remained personal property. Murdock v. Gifford, 18 N. Y. 28. In this case the court said:

> "Applying this principle (application of the rule of fixtures), to the case of a factory, the wheel or engine which furnished the motor power, and all that part of the gearing and the machinery which has special relation to the building with which it is connected, would belong to the freehold; while an independent machine like a loom which, if removed, still remains a loom, and can be used as such wherever it is wanted and power can be applied to it, will still retain its character personality."

The law in New York seems to have been adequately and concisely summed up in the case of the New York Life Insurance Co. v. Allison, 107 Fed. 179 in the following language:

> "The decisions of the New York courts are in harmony with the general trend of the adjudications elsewhere, and are to the effect that the machine does not become a fixture by merely attaching it to the building, without the intention to make it a permanent accession, when it is not so incorporated with the building as to lose its identity, or render it difficult or injurious to the building to remove it, or when it is not essential to the use to which the part of the building in which it is connected is

> appropriated (Murdock v. Gifford, 18 N. Y. 28; Potter v. Cromwell, 40 N. Y. 287). The annexation is treated as of a premanent nature when the building is to be devoted to the purposes for which the machinery is to be used, and is not complete in the absence of the machinery."

There is no conflict in the decisions that the intention of the annexor is an important feature in determining whether or not the fixture has retained its character as personal property or has become part of the realty to which it is annexed. Where there is conflict in the decisions it arises as to what evidence is necessary to establish such intent and the proper application of the facts to the particular case in mind. It is sometimes said:

> "That the intent of the party annexing an article to the freehold is the most important criterion of its character as a fixture, and other circumstances or facts are valuable chiefly as evidence of such intention." Cyc. of Law and Procedure, Vol. 19, Page 1046 and cases there cited.

Upon the general proposition of the importance of such intent see the following cases:

Voorhees v. McGinnis, 48 N. Y. 278
Bishop v. Bishop, 11 N. Y. 123
Snedeker v. Warring, 12 N. Y. 170
Potter v. Cromwell, 40 N. Y. 278
McRea v. Central Nat. Bank of Troy, 66 N. Y. 489
National Starch Co., v. Waldron, 26 A. D. (N. Y.) 527
McMillan v. Leaman, 101 A. D. (N. Y.) 436
Wells v. Maples, 15 Hun (N. Y.) 90
Borland v. Hahn, 25 N. Y. S. 131
Scobell v. Block, 31 N. Y. S. 975
Matter of Mayor, 37 A. D. (N. Y.) 589
13 American and English Cyc. of Law, 2nd Edition, 613
McConnell v. Blood, 123 Mass. 47
Southbridge Savings Bank v. Exeter Mach. Works, 127 Mass. 542
Roddy v. Brick, 42 N. J. Eq. 225
Fortman v. Goepper, 14 Ohio St. 558
Wager v. Cleveland & R. R. Co., 22 Ohio St. 563
General Electric Co. v. Transit Equipment Co., 42 Atl. Rep. (N. J.) 101.
Fifield v. Farmers Nat. Bank, 148 Ill. 163
Hawkins v. Hersey, 86 Me. 396
Chase v. Tocoma Box Co., 11 Wash. 377
Rodgers v. Brokaw, 25 N. J. Eq. 496
Pope v. Jackson, 65 Me. 162
Pfluger v. Carmichael, 54 A. D. (N. Y.) 153

Wolford v. Baxter, 33 Minn. 12
Fullam v. Stearns, 30 Vt. 443
Hill v. Wentworth, 28 Vt. 428
Ewell on Fixtures, Page 28
New York Life Insurance Co. v. Allison, 107 Fed. 179
Bender v. King, 111 Fed. 60
Andrews v. Chandler, 27 Ill. App. 103
Moody v. Aiken, 50 Tex. 65
Swift v. Thompson, 9 Conn. 63
Gaylor v. Harding, 37 Conn. 508
Wade v. Johnston, 25 Geo. 331
Gunderson v. Kenndy, 104 Ill. App. 117
Readfield Tel. Co. v. Cyr, 95 Me. 287
Robertson v. Corsett, 39 Mich. 777
Ferris v. Quimby, 41 Mich. 202
Morrison v. Berry, 42 Mich. 389
Aldine Mfg. Co. v. Barnard, 84 Mich. 632.
Lansing Iron and Engine Works v. Wilbur, 111 Mich. 413
Hudson Trust & Savings Inst. v. Carr-Curran Paper Mills, 58 N. J. Eq. 59
Temple Co. v. Penn. M. Life Ins. Co., 69 N. J. L. 36
E. M. Fish Co. v. Young, 127 Wis. 149
Crane Iron Works v. Wilkes, 64 N. J. L. 193
Neufelder v. Third St. & S. Ry. 23 Wash. 470
Carpenter v. Allen, 150 Mass. 281

AGREEMENT BETWEEN OWNER OF REALTY AND OWNER OF PERSONALTY ATTACHED

It has been generally held that by agreement between the owner of the realty and the owner of the personalty the articles attached retain their character as personal property even though they would have become realty when attached in the absence of such agreement, as where it is provided that the title to the personal property attached shall not pass to the owner of the realty until the purchased price is paid or where a chattel mortgage is given covering such personal property. The principle above enunciated only covers cases where such an agreement exists. It is, therefore, a well established rule of law that the character of fixtures may be changed from real estate to personalty by agreement.

Walder v. English, 137 A. D. (N. Y.) 43
Jermyn v. Hunter, 93 A. D. (N. Y.) 175
19 Cyc Page 1048
N. Y. Inv. Imp. Co. v. Cosgrove, 167 N. Y. 601
Sisson v. Hibbard, 10 Hun (N. Y.) 420.
Trowbridge v. Hayes, 45 N. Y. S. 635

Ford v. Cobb, 20 N. Y. 344
Tyson v. Post, 108 N. Y. 217
Andrews v. Day B. Co., 132 N. Y. 348
Tifft v. Thornton, 53 N. Y. 377
Kirbbs v. Alford, 120 N. Y. 519
Carpenter v. Allen, 150 Mass. 281

LANDLORD AND TENANT.

The principles of law heretofore enunciated concerning fixtures applied as before stated between —

(a) Vendor and Vendee
(b) Grantor and Grantee
(c) Mortgagor and Mortgagee
(d) Heir and Personal Representative of Deceased.

The foregoing rules or principles established do not apply between Landlord and Tenant as the Law of Fixtures between Landlord and Tenant is more favorable to the Tenant than it is to Vendee, Grantee, Mortgagee or Personal Representative of Deceased.

The rule between Landlord and Tenant as now understood is that, upon principles of general policy a Tenant whether for life, for years, or at will, is permitted to carry away all such fixtures of a chattel nature as he had himself erected upon the demised premises for the purposes of ornament, domestic convenience or to carry on trade, provided the removal can be effected without material injury to the freehold, or to the fixtures themselves.

Wall v. Hinds, 4 Gray (Mass.) 270
Allen v. Mayfield, 127 Pac. (Cal.) 44
Collamore v. Gillis, 149 Mass. 578, 5 L. R. A. 150
Cooper v. Johnson, 143 Mass. 108.
Matter of the City of New York, 118 A. D. (N. Y.) 856

It has been stated as a general proposition that in regard to Landlord and Tenant the Tenant may remove any fixture erected by him for the purpose of trade or manufacture which can be removed without injury to the fixture or the freehold, provided the removal is made prior to the termination of the lease, where the term is definite, and within a reasonable time after the expiration of the term in case the term is indefinite. If, on the other hand, the fixture cannot be removed without material injury either to the fixture or the freehold the Tenant cannot remove the fixture but it becomes and remains a part of the realty. Collamore v. Gillis, supra.

It has been said that fixtures which a Tenant is allowed to disannex and take away are comprehended within two classes or are of a mixed na-

ture, falling partly within and partaking of the nature of both. These classes are, first, those which are put up for ornament or the more convenient use of the premises and are called domestic fixtures; second, those which are put up for the purposes of trade and are known as trade fixtures. Wall v. Hinds, supra.

The reason for the rule as to fixtures between Landlord and Tenant is that the law regards with peculiar favor the rights of Tenants to remove articles annexed by them to the freehold, and extends much greater indulgence to them in this respect than it concedes to any other class of persons.

Taylor v. Townsend, 8 Mass. 411
Whiting v. Brastow, 21 Mass. 310
Gaffield v. Hapgood, 34 Mass. 192
Miller v. Baker, 42 Mass. 27
Winslow v. Merchants Insurance Co., 45 Mass. 306
Wall v. Hinds, 4 Gray (Mass.) 270
King v. Johnson, 73 Mass. 239

In the case of Massachusetts National Bank v. Shinn, 18 A. D. (N. Y.) 279, the court said:

> "As between landlord and tenant, the placing of machinery or other appliances by the tenant upon the leased premises, for the purpose of trade or manufacture to be carried on by the tenant, does not make the property so affixed a part of the freehold, but it still remains personalty, to such an extent at least that the tenant retains the right to remove it."

In the case of Matter of the City of New York, 118 A. D. (N. Y.) 865, it was stated:

> "As between landlord and tenant the tenant is allowed to remove fixtures annexed to the freehold; but it is only as between landlord and tenant that the rule of the common law that anything that was annexed to the freehold by a substantial connection becomes a part of the realty has been relaxed."

DECISIONS UNDER THE TAX LAW

Some confusion has resulted in certain cases which have been decided under the tax law in regard to whether certain articles of machinery or fixtures were to be taxed as real estate or personal property. We have seen that the legislature has the power to make personal property real estate or real estate personal property for the purposes of taxation. Therefore, if certain machinery or other fixtures are taxable as real estate under the definition of that term in the tax law the decisions declaring such machinery taxable as real estate because of such definition have no relation whatever to the common law rule of fixtures and should not be cited as authority in determining whether certain articles of property

are to be classified as realty or personalty under the common law rule of fixtures.

In the tax law in the State of New York the terms "land," "realty," and "real property," are defined to "include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under or above or affixed to the same." Under this definition certain decisions have been made holding articles of machinery to be real estate.

New York Edison Co. v. Wells, 135 A. D. (N. Y.) 644
People Ex Rel. Manhattan Ry. Co. v. Wells, 122 A. D. 921, affirmed 192 N. Y. 566
Herkimer Light & Power Co. v. Johnson 37 A. D. (N. Y.) 257
People Ex Rel. National Starch Co. v. Waldron, 26 A. D. (N. Y.) 527
Detroit United Ry. Co. v. Tax Commissioners, 136, Mich. 96

In the case of People Ex Rel. National Starch Co. v. Waldron, supra, it was held that—machinery consisting in part of machines standing on brick or wooden foundation, fastened with bolts, in part of machines slightly fastened with screws, and in part of shafting, all capable of being removed without material injury to the buildings in which they were, which had been placed in the building by its owner, a manufacturing company, for the purpose of conducting a manufacturing business, to which the machinery was essential, and which had been purchased together with the premises, by a corporation which conducted a similar business thereon, must be deemed to have been permanently annexed to the land for the purpose of the business, and as such was taxable as "land" within the meaning of that term as defined in the tax law.

In this case the court said:

> "The corporation being the owner of the entire property, I think that the rule to be applied to the people is to be decided upon principles no less rigid than those which would be applied to a question of fixtures arising between vendor and vendee."

It should be noted that the court does not undertake to state what the rule between vendor and vendee is but upon an examination of the case it will be noted that the machinery was held to be real estate in that case because of the definition of real estate contained in the tax law.

In the case of Herkimer Light and Power Co. v. Johnson, supra, we find this language:

"We are of the opinion that the language in the * * * tax law providing that 'all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting * * * * electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby' must be deemed applicable to machinery used in connection with the mains or wires generating or sending forth electricity on the lines or gas through the mains."

Whether or not this case was properly decided, it is a fact that the machinery there held to be real estate was so held because of the definition of "land" in the tax law and without regard to the common law rule concerning fixtures.

It has also been held in New York under the tax law that a switchboard and appliances essential for the business of a telephone company placed in a building on which it has a lease for ten years were properly taxable as real estate. People v. Longwell, 131 N. Y. S. 361.

CONCLUSIONS

The conclusions that can be drawn from the foregoing decisions would seem to be as follows:

First. That as a matter of law actual annexation other than by weight or connection with the motive power is necessary in order to make machinery or equipment realty.

Second. That as a matter of law, in the absence of evidence establishing intent upon the part of the annexor to make the machinery or equipment attached a permanent accession to the freehold attachment for the purpose of keeping the machinery or equipment steady and in place during the operation or use for which the machinery or equipment was intended is insufficient to make the machinery or equipment real estate.

Third. That as a matter of law special appropriation to the realty to which the fixture is annexed is evidence bearing upon the intent of the annexor in making the annexation.

Fourth: That the intent of the annexor in making the annexation is a mixed question of law and fact but when the facts are found by jury or referee the application of such facts and the determination as to the character of the machinery or equipment based upon such facts is a matter of law. We cannot hope to reconcile all cases decided upon the intent of the annexor because the facts in each case concerning such intent are not always fully or sufficiently disclosed. The rule of most general application is that where the facts establish that the building is to be devoted generally to the exclusive purposes for which the attached machinery or equipment is to be used; is incomplete without such machinery or equipment, making both building and machinery or equipment specially adapted, the one to the other, the conclusion as a matter of law is that the annexor intended to make such machinery or equipment a permanent accession to

the freehold. On the other hand, where the facts establish that such machinery or equipment is not so incorporated with the building as to lose its identity; removable from the building without material injury to either the building or the machinery or equipment and usable in other locations as well as in the building to which it is attached, the conclusion as a matter of law is that the annexor did not intend to make such machinery or equipment a permanent accession to the freehold.

Fifth. That the foregoing conclusions do not apply between Landlord and Tenant because the Tenant as a general proposition is permitted to remove any and all fixtures erected by him for trade, etc., in case they can be removed without material injury to the freehold, the Tenant being presumed to have intended to remove his fixtures at the end of his term.

Sixth. That cases deciding certain machinery or equipment real estate under the definition of real estate under the tax law have no application to the determination of the "Law of Fixtures" under the common law.

NEW YORK INCOME TAX LAW.

Before closing brief mention is made of the New York Income Tax Act adopted June 4, 1917, and made applicable only to manufacturing and mercantile corporations. This Income Tax imposed upon manufacturing and mercantile corporations in New York was in lieu of any tax upon the franchises or personal property of such manufacturing or mercantile corporations. As this tax was in lieu of any tax upon personal property it became important to ascertain what machinery of manufacturing corporations should be taxable as real estate and what machinery of such corporations should be taxable as personal property in order that there might be no discrimination between the taxation of personal property of mercantile corporations and personal property of manufacturing corporations both classes of corporations being subject to the same income tax and at the same rate.

It was ascertained that under the tax law of the State as construed by the State Tax Department practically all machinery of manufacturing corporations was made subject to taxation as real estate regardless of its true character as real estate or personalty. In order that there might be no discrimination in the application of the income tax as a substitute for any tax upon personal property the following language was inserted in the income tax act:

"After this article takes effect manufacturing and mercantile corporations shall not be assessed on any personal property which for the purpose of this exemption shall include such machinery and equipment affixed to the building as would not pass between grantor and grantee as a part of the premises if not specifically mentioned or referred to in the deed, or as would, if the building were vacated or sold or the nature of the work carried on therein

changed, be moved, except boilers, ventilating apparatus, elevators, gas, electric and water power generating apparatus and shafting."

While this is an exemption from local taxation of certain machinery of manufacturing corporations, the corporations owning such machinery are in no way exempt from taxation because there is substituted in lieu of a tax upon such machinery an income tax the proceeds from which will many times offset any tax ever assessed or collected against such machinery. This provision would appear to be very broad and in the first place would nullify the definition of real estate under the tax law as applied to machinery other than boilers, ventilating apparatus, elevators, gas, electric and water power generating apparatus and shafting, which articles of machinery were specifically made real estate and taxable as such under the Income Tax Act. In the second place, all machinery even though permanently affixed to the real estate would be personal property in all cases where it would not pass between grantor and grantee as a part of the premises without being specifically mentioned and referred to in the deed. In the third place, all machinery or equipment which would be moved in case the building were vacated or sold or the nature of the work carried on therein changed would be deemed personal property for the purposes of taxation subsequent to the enactment of the Income Tax Act. Under this last provision it would seem that practically all machinery and equipment other than those articles specifically declared to be real estate which were not so incorporated as a part of the building as to make the moving of them impracticable or as would necessarily cause material injury to the building or to the machinery to be moved, would be deemed personal property and not real estate. This is so because in the light of reason it would appear that if a building were vacated or the work carried on therein changed, all machinery useful in any other building would certainly be moved for use in some other location. This would seem to be the only practical interpretation which could be put upon this provision if it were interpretated in the light of reason and in view of commercial custom. It is most certainly the custom when manufacturers vacate any building to remove therefrom such machinery and apparatus which is useful in other locations.

Therefore it would seem probable that under the Income Tax Law in the State of New York practically all manufacturing machinery and apparatus other than boilers, ventilating apparatus, elevators, gas, electric and water power generating apparatus and shafting, which could be moved without material injury either to the machinery, the apparatus or the building and useful in other locations would be deemed personal property under such act.

This provision has been construed by the State Tax Department of the State of New York in a bulletin dated June, 1917, for the information of Assessors. The construction of the State Tax Department is as follows:

"This law includes as personal property 'such machinery and equipment affixed to the building as would not pass between grantor and grantee as a part of the premises if not specifically mentioned or referred to in the deed, or as would, if the building were vacated or sold, or the nature of the work carried on therein changed, be moved, except boilers, ventilating apparatus, elevators, gas, electric and water power generating apparatus and shafting.'

"In assessing the real estate of such corporations assessors are instructed to include

"1. Boilers, ventilating apparatus, elevators, gas, electric and water power generating apparatus and shafting.

"2. Such machinery and equipment affixed to the building as would pass between grantor and grantee as a part of the premises if not specifically reserved in a deed thereof. This means such machinery and equipment so affixed that it cannot be removed without material injury to the building.

"Movable machines and equipment cannot now be assessed as a part of the real estate.

"Leased machinery and the machinery and equipment of a tenant cannot now be assessed as real estate, except boilers, ventilating apparatus and other machinery as described in paragraph '1' above, which should be treated as a part of the building and assessed as real estate."

FINAL CONCLUSION.

I have endeavored in the foregoing to state briefly the common law rule concerning the taxation of machinery and fixtures and in that connection have made brief reference to the application of such rule in connection with the New York Income Tax Act. Whatever the law may be deemed to be in any jurisdiction it would appear that the time has come for a classification of all tangible personal property and the subjection of such property to either a classified personal property tax or to an income tax in lieu of any ad valorem personal property tax thereon. As machinery and apparatus which can be moved from place to place is economically personal property whether it be attached to real estate or not and is necessarily subject to state and interstate competition so far as the manufacture of the product which the machine is designed to manufacture is concerned, it would seem that in any scheme of equitable taxation of tangible personal property such machinery and apparatus should be made personal property and not real estate so as not to have any discrimination between different kinds of tangible personal property.

Respectfully submitted,

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